

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CARRIE L. NASI)	
Claimant)	
V.)	
)	
JIMMY'S EGG)	Docket No. 1,067,478
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge Thomas Klein's November 5, 2014 preliminary hearing Order. Melinda G. Young, of Hutchinson, appeared for claimant. Kendra M. Oakes, of Kansas City, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the transcript of the October 23, 2014 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

This claim involves an October 22, 2012 slip and fall. Claimant alleges the accident caused her previously stable cervical spine fusion to crack. Claimant had a prior neck injury necessitating cervical fusions in 2008 and 2011. Based on a court-ordered independent medical examination, the judge found claimant did not prove her accident arose out of and in the course of her employment and/or her accident was the prevailing factor in her need for treatment.

Claimant requests the Order be reversed. She argues her treating surgeon's opinion that her fall was the prevailing factor in causing cracks in her previously fused cervical spine establishes compensability. Respondent maintains the Order should be affirmed.

The issue for review is: Did claimant sustain personal injury by accident arising out of and in the course of her employment, including whether her accident was the prevailing factor in causing her injury, medical condition, and resulting disability?¹

¹ "Prevailing factor" a component is of "arising out of" employment and does not concern whether an accident occurred "in the course of" employment. See K.S.A. 2012 Supp. 44-508(f)(2)(B)(ii).

FINDINGS OF FACT

Prior to her work accident, claimant had prior neck and upper extremity problems, including two cervical spine fusions. She was involved in a motor vehicle accident (MVA) in which her vehicle was rear-ended by another vehicle on November 1, 2008 in a Spangles drive-through lane. Subsequently, on November 4, 2008, John Dickerson, M.D., operated on claimant's neck, performing an anterior discectomy with interbody fusions at C5-6 and C6-7. Claimant developed increased neck pain radiating into her shoulders and right triceps. Claimant testified she did terribly and suffered for a long time with "tons of problems" after the first surgery.² Conservative treatment failed to provide relief.

According to Dr. Dickerson's July 22, 2011 history and physical, a CT scan and x-rays showed a likely pseudoarthrosis at C5-6. That day, Dr. Dickerson operated on claimant's neck. He performed an anterior cervical discectomy and fusion at C4-5, removal of hardware from C5 through C7, and exploration of the previous fusion at C5-6 and C6-7. Dr. Dickerson's surgical report noted he inspected the prior fusion sites and they were solidly fused, even at C5-6 where there had been concern about a possible pseudoarthrosis. Claimant testified she did much better after her second neck surgery, but was not asymptomatic.

September 1, 2011 x-rays of claimant's cervical spine were suspicious for pseudoarthrosis at C5-6.

Claimant continued to treat with Dr. Dickerson. On November 17, 2011, claimant told Dr. Dickerson she had constant headaches, neck pain, bilateral shoulder pain, bilateral arm pain and pain in the index and third fingers and toes. Dr. Dickerson diagnosed her with a herniated cervical disc.

In December 2011, claimant began working for respondent as a waitress, which was her first job subsequent to her MVA. Claimant testified she was able to work for respondent because she was a "lot better"³ after her second surgery, but she was still in pain and was not able to return to her prior job as a dental assistant.

Kevin C. Hoppock, M.D., claimant's primary care physician, evaluated claimant on July 26, 2012. Claimant reported upper back and neck tension and tightness, especially associated with respondent's rush of customers at lunch time. Claimant was interested in a muscle relaxer in lieu of using Lortab.

² P.H. Trans. at 25; see also p. 9.

³ *Id.* at 9, 26.

Claimant contacted Dr. Dickerson's office on September 14, 2012, based on her concerns about using narcotic medication. She was taking up to eight Lortab pills a day. She testified she was still in pain, but wanted non-addictive medication. Claimant continued to take narcotic pain medication up until the time of her October 22, 2012 accident.

Claimant testified that on October 22, 2012, she was walking past the sink area at work when she slipped and fell on a wet floor, grabbed the sink with her right arm to stop her fall and went all the way to the floor. She testified the fall was witnessed by respondent's manager and two coworkers. According to claimant, she immediately experienced severe pain in her right arm and her neck felt swollen. Shortly thereafter, she was sent home where she iced the affected areas and took pain medication.

According to claimant, she called Dr. Dickerson's office the following day about getting a CT scan. It appears Dr. Dickerson ordered a CT scan. Claimant testified she did not mention to Dr. Dickerson's office she had fallen at work because she did not think "it was relevant" and did not know if she was "hurt."⁴ Claimant testified she did not tell Dr. Dickerson's staff about a work accident because she did not want to make a big deal at work and wanted to keep her job.

Claimant went to Aaron Guyer, PA, at Dr. Hoppock's office on October 25, 2012. She complained to him that she had a rash, a bump on her wrist and chronic neck pain. Claimant did not tell Mr. Guyer about an accidental injury at work because she "didn't know if there was anything really wrong"⁵

A CT scan was performed on October 25, 2012. A radiologist, Norman Pay, M.D., indicated the study showed perigraft lucencies of the bone plugs at the C5-6 and C6-7 disc spaces, suspicious for pseudoarthroses.

According to Dr. Dickerson's October 25, 2012 phone note authored by his staff, the CT scan showed good hardware alignment, a solid fusion and no evidence of hardware loosening. A member of Dr. Dickerson's staff relayed the film review results with claimant on November 5, 2012. Dr. Dickerson recommended claimant have physical therapy.

Based on what Dr. Dickerson told her about the results of her CT scan, claimant assumed she was not hurt badly. Claimant testified she returned to work, but her pain kept getting worse. She stated other workers had to help her and respondent modified her job duties.

⁴ *Id.* at 14.

⁵ *Id.* at 35.

Dr. Hoppock's December 11, 2012 report states claimant had fallen at work, pulled her right shoulder and twisted her right foot. Claimant testified such record concerned her October 22, 2012 fall.

Because she had continuing pain, claimant returned to Dr. Dickerson on January 17, 2013. Dr. Dickerson again reviewed the same CT scan from October 2012. This time, Dr. Dickerson noted the CT scan revealed what looked like a possible nonunion of the previous fusion at C5-6. Claimant testified Dr. Dickerson told her it looked like she had a fracture. Dr. Dickerson ordered a repeat CT scan.

Claimant testified respondent assigned her work to someone else in February 2013. She has not subsequently worked anywhere.

On February 28, 2013, claimant had another CT scan. The radiologist, Darren Orme, M.D., had the following relevant impressions: (1) postoperative changes across the C4-5 disc space and (2) likely prior fusion surgical changes at C5-6 and C6-7 without complete or significant bony fusion across such disc spaces and significant endplate osteophyte formation at C5-6 causing significant left neural foraminal narrowing.

Claimant also returned to Dr. Dickerson on February 28, 2013. Claimant complained of severe intractable neck pain with numbness and tingling in the right arm to the fourth and fifth digits, left upper posterior arm and triceps distribution, in addition to popping and cracking in her neck. According to Dr. Dickerson, his review of the newest CT scan revealed pseudoarthrosis at C5-6 and C6-7. He recommended revision of the C5-6 fusion, exploration of C6-7 and plating from C5 to C7.

Dr. Dickerson performed such surgery on March 15, 2013. He identified pseudoarthrosis at C5-6. On April 1, 2013, Dr. Dickerson noted claimant's symptoms had not improved. At a June 27, 2013 followup appointment, claimant continued to complain of a sore neck, daily headaches and a knot at the right scapula, in addition to right shoulder and upper arm pain with numbness into the fourth and fifth digits. Dr. Dickerson noted in a June 27, 2013 letter that the prevailing factor in claimant's need for surgery was directly related to her fall at work.

In an undated letter to claimant's attorney, Dr. Dickerson addressed causation and prevailing factor. He stated:

. . . As stated in the operative report, the previous fusion sites were inspected and they were found to be solidly fused, even the C5-C6 level which there was some concern about. A subsequent x-ray of the cervical spine in September 2011 reported as "suspicious for pseudoarthrosis at C5-C6" but was not concerning given the July 22, 2011 procedure during which I carefully explored and confirmed that the C5-C6 was solidly fused.

Mrs. Nasi healed quite well following the July 2011 procedures. She had returned to working as a waitress and had been doing relatively well until she slipped and fell at work in October 2012 and had onset of neck pain. Subsequent CT scan revealed cracks to the fusions at both C5-C6 and C6-C7 consistent with pseudoarthrosis that developed after the trauma in the fall. In March 2013, she underwent a redo anterior cervical discectomy and fusion at C5-C6 and C6-C7 which confirmed new cracks to the previously well fused site. The fall at work is the prevailing factor in causing her condition and the need for surgery.⁶

On February 12, 2014, at respondent's request, Chris Fevurly, M.D., examined claimant. Claimant complained of neck and upper back pain which radiated into the right upper arm and down to the fourth and fifth digits, occipital headaches, pain in the right shoulder with movement and persistent low back pain. Dr. Fevurly diagnosed claimant with chronic neck pain, chronic low back pain with reported advanced degenerative disc disease and spinal stenosis, history of depressive and anxiety disorders, chronic opiate addiction and drug seeking behavior.

In addressing causation and prevailing factor, Dr. Fevurly stated:

The medical reports do not support her claim that a fall at work on 10/23/12 caused a nonunion or fracture of the previous fusion of C5-6 and C6-7. The alleged work-related fall on 10/23/12 is not the prevailing factor for any of the evaluation and treatment outlined under the report of accident/clinical course section above. The fall at work actually occurred on 12/11/12 (not on 10/23/12) and the fall was 6 weeks after the CT scan on 10/25/12 showed the nonunion of C5-6. In spite of the claim that there was adequate fusion of C5-6 and C6-7 in May 2011 prior to the removal of the hardware in July 2011, a review of the CT scan and MRI on 5/3/11 with the hardware in place makes it impossible for me to confirm there was an adequate fusion. Thus, the nonunion may have existed ever since 2008 but never adequately identified. It is clear from the records that she has never reported resolution of her headaches[,] neck, upper back, and arm pain since 2008 through October 2012 when she alleges there was recurrence of the same severe symptoms she alleges were present from November 2008 to July 2011.⁷

A preliminary hearing was scheduled to occur on February 18, 2014. In a February 18, 2014 Order, the judge appointed Paul Stein, M.D., to provide a prevailing factor opinion and treatment recommendations.

Dr. Stein examined claimant on April 3, 2014. Claimant told Dr. Stein that she slipped on a wet floor, grabbed a sink with her right hand and fell to the floor without hitting her head. Claimant complained of neck pain extending into both upper extremities, right

⁶ *Id.*, Ex. 2.

⁷ *Id.*, Ex. B at 11.

more than left, and intermittent numbness by the right triceps muscles. Dr. Stein reviewed over 700 pages of medical records, but did not review actual imaging studies. Dr. Stein noted claimant had a long history of neck and upper extremity symptomatology. Claimant told Dr. Stein her neck, right shoulder and arm pain was worse after her accident, as was her preexisting left third and fourth finger numbness. According to Dr. Stein, claimant told Dr. Dickerson's staff on October 23, 2012, that her symptoms started a couple weeks earlier and she did not recall an injury. Dr. Stein characterized the February 28, 2013 CT scan as showing incomplete healing of fusion changes at C5-6 and C6-7.

In addressing causation and prevailing factor, Dr. Stein stated:

I. SYMPTOMATOLOGY

The claimant states that she was doing relatively well prior to the fall at work although she was still taking narcotic pain medication. The medical records are not fully consistent with that statement. She called the office of Dr. Dickerson at approximately 10:30 AM on 10/23/12 complaining of occipital and neck pain to the right which she reported started a few weeks previously and became progressively worse. She reported a jolting and burning pain when turning her head to the right. There was no statement regarding a fall at work. While there may have been some subjective increase in symptoms after the fall at work, it is clear that the symptomatology was present and significant prior to that time.

II. PSEUDOARTHROSIS

Despite several statements by Dr. Dickerson suggesting that the fall caused the nonunion of the C5-C6 & C6-C7 grafts, this is not the case. Firstly, a solid fusion can be fractured only very rarely and with considerable force much greater than in this case. Additionally, that would present as a fracture (broken neck) not as a nonunion which has a different appearance on imaging studies. Secondly, and perhaps more important, is the fact that a cervical spine x-ray on 9/1/11 was reported as suspicious for pseudoarthrosis at C5-C6. This is a year prior to the fall at work. A CT scan would have shown this pathology more clearly but was not done until after the fall the next year.

In summary regarding causation, while the fall at work probably aggravated the preexisting pseudoarthrosis, the structural pathology was present and symptomatic prior to the fall. The primary and prevailing factor in the post-fall symptomatology, need for treatment, and surgery, was the preexisting pathology in the cervical spine.⁸

After receipt of Dr. Stein's report, a preliminary hearing occurred on October 23, 2014, and the parties presented evidence consistent with the above-noted facts.

⁸ *Id.*, Ex. A at 8.

In the November 5, 2014 Order, the judge ruled:

Claimant had previously undergone neck surgeries for an auto accident. She alleges a fall in the employ of the Respondent on October 22, 2012. In March 2013 she underwent a cervical redo anterior cervical disectomy and fusion on C5-C6 and C6-C7 by Dr. Dickerson. Dr. Dickerson contends that claimant's neck was solidly fused in July, 2011.

Claimant was seen by Dr. Fevurly who could not confirm that the claimant's alleged fall was the prevailing factor for any of the claimant's issues.

The court ordered an IME with Dr. Stein in order to resolve the conflict of opinion between Dr. Dickerson and Dr. Fevurly. Dr. Stein found that the fall probably aggravated the pre-existing pseudo-arthritis and her need for treatment was due to her pre-existing pathology.

Based on the report of Dr. Stein, claimant has failed to prove that her accident arose out of an in the course of her employment and/or that her accident is the prevailing factor in her need for treatment. The court declines to order benefits pending further hearing.⁹

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

⁹ ALJ Order (Nov. 5, 2014) at 1.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

K.S.A. 2012 Supp. 44-508(f)(2)(B)(ii) states an injury by accident only arises out of employment if the accident is the prevailing factor in causing the injury, medical condition and resulting disability. The underlying Order denied benefits based on Dr. Stein's prevailing factor opinion. As such, this Board Member will address whether claimant's injury by accident arose out of her employment, including the prevailing factor component.

This case hinges on whether claimant had a preexisting nonunion of her fusion, as opined by Dr. Stein, or she sustained a work-related fracture or break of a solid fusion, as opined by Dr. Dickerson.

Claimant's September 1, 2011 x-rays were interpreted as suspicious for pseudoarthrosis at C5-6. Dr. Dickerson concluded such x-rays were not concerning because he observed a solid fusion when he operated on July 22, 2011. While there is no proof of an intervening injury, Dr. Dickerson's opinion presupposes a solid fusion on July 22, 2011, would still exist as of September 1, 2011.

Dr. Dickerson stated claimant was doing "relatively well" after her July 2011 surgery. His conclusion is disputed by Drs. Fevurly and Stein. Claimant was taking up to eight Lortab pills a day 14 months after her surgery.

Dr. Dickerson also seemingly contradicts himself by indicating the October 25, 2012 CT scan showed a solid fusion (despite the radiologist suspecting pseudoarthroses), but later opining, on additional review of the same CT scan nearly three months later, that cracks were present.

Dr. Fevurly believes claimant's fall occurred on December 11, 2012. Such opinion is against the weight of the evidence. His opinion that claimant's nonunion "may" have existed from 2008 forward is not particularly helpful where the burden of proof is based on a preponderance of the evidence.

Dr. Stein flatly refutes Dr. Dickerson's opinions. Dr. Stein noted claimant's symptomatology was present and significant prior to her October 22, 2012 fall and claimant told Dr. Dickerson's staff on October 23, 2012, that her increased symptoms commenced a few weeks earlier. While it would be preferable to this Board Member if Dr. Stein personally viewed the imaging study films, he unequivocally stated claimant's fall did not cause a nonunion of her surgical grafts because: (1) a fracture of a solid fusion would require considerable force much greater than what occurred in claimant's accident; (2) a fracture of a fusion would be seen on an imaging study as a broken neck, not as a nonunion; and (3) claimant's September 1, 2011 x-ray was suspicious for pseudoarthrosis at C5-6.

This is an exceedingly close decision. Based on the current evidence, the undersigned Board Member affirms the Order based on Dr. Stein's prevailing factor opinion. Because claimant's accident was not the prevailing factor in causing her injury, medical condition, and resulting disability, claimant did not prove her injury by accident arose out of her employment. Whether claimant's injury by accident occurred in the course of her employment is moot.

CONCLUSIONS

Claimant did not prove her injury by accident arose out of her employment because her accident was not the prevailing factor in causing her injury, medical condition, and resulting disability.

WHEREFORE, the undersigned Board Member affirms the November 5, 2014 Order.¹⁰

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Thomas Klein

¹⁰ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.